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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

LB 4 FISH, LLC, Plaintiff and Respondent, v. DEVELOPERS DIVERSIFIED REALTY CORPORATION et al., Defendants and Appellants.	B215275 (Los Angeles County Super. Ct. No. NC039083)

APPEAL from a judgment of the Superior Court of Los Angeles County, Joseph E. Di Loreto, Judge. Affirmed.

Winston & Strawn, John S. Gibson, David H. Stern, and Veronica L. Harris for Defendants and Appellants.

Waldron & Bragg, Gary A. Waldron, Sherry S. Bragg and Katherine K. Meleski; The Sall Law Firm and Robert K. Sall for Plaintiff and Respondent.

I.

INTRODUCTION

Plaintiff and respondent LB 4 Fish, LLC (Gladstone's) was the owner of Gladstone's restaurant, located on land operated by defendant and appellant Developers Diversified Realty Corporation (DDR). Gladstone's sued DDR. The thrust of Gladstone's lawsuit was that DDR made material misrepresentations about the availability of the valet parking, thereby causing damages, including lost profits. The jury found in favor of Gladstone's on its causes of action for fraud and breach of contract and thereafter, the trial court reformed a provision in the contract. DDR appeals from the judgment entered in favor of Gladstone's for more than $7 million. DDR also appeals from the denial of its motion for new trial.

On appeal, DDR has not raised the issue of whether the level of valet parking services it provided was adequate under the lease. Rather, it contends on appeal that: (1) there was no substantial evidence to prove there were intentional misrepresentations, reasonable reliance, and scienter with regard to the fraud cause of action; (2) Gladstone's failed to prove causation; (3) Gladstone's failed to prove damages; and (4) it was entitled to a new trial because of instructional error and the erroneous introduction of evidence. We affirm.

II.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Factual background*.

Following the usual standard of review after a jury verdict, we state the facts in the light most favorable to the judgment. (*Blanks v. Seyfarth Shaw LLP* (2009) 171 Cal.App.4th 336, 346, fn. 2; *Woodman Partners v. Sofa U Love* (2001) 94 Cal.App.4th 766, 771.)[1]

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[1] Gladstone's has submitted a motion to strike portions of DDR's opening brief and a motion for sanctions. We have considered only that evidence presented to the jury. All references in DDR's briefs to items that were not before the jury, or for which DDR did

DDR had a contract with the City of Long Beach (the City) granting DDR the right to develop and operate a retail, entertainment, and dining hub. This development, often referred to as the Pike at Rainbow Harbor, had two sections across the street from one another, on either side of Shoreline Drive, at the corner of South Pine Avenue. The waterfront section was located where South Pine Avenue ended in a cul-de-sac, or the circle. The Pine Avenue Pier ran from the beach and ended at the circle.

As planned, there were to be a number of restaurants surrounding the circle, and others near the circle, south of Shoreline Drive.

While there was a small surface parking lot abutting Shoreline Drive on the waterfront side of the development, it could not accommodate the number of people who were expected to frequent the complex. Also, there was a parking structure that was a significant distance from the restaurant. Thus, patrons of the businesses located south of Shoreline Drive, including Gladstone's, would rely on valet parking.

The availability of parking is a factor in determining the size of a restaurant. Parking is the first aspect of a restaurant noticed by customers, and provides customers with their last impression when they leave. Some factors used to ascertain the adequacy of valet parking services are: its location and proximity to the restaurant; the operating hours; staffing; the timeliness of the delivery of cars; and how the car is handled while the valet has the car.

Parking was critical to Gladstone's decision to enter into a lease with DDR for restaurant space in the circle. Gladstone's customers would spend more per person (guest/check ratio) than most of the restaurants in the circle, and the surface lot where people could self-park was some distance away from Gladstone's. Thus, it was expected that most of Gladstone's customers would rely upon valet parking. These and other circumstances made the number and location of the valet stations, the hours of valet

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not provide proper citations to the record, have been stricken from DDR's briefs. In all other respects, Gladstone's motions are denied.

operation, and the quality of the parking services significant considerations in Gladstone's decision to lease the property.

In 2001, DDR and Gladstone's negotiated the terms of a lease. Gladstone's told DDR it would not complete the lease agreement unless DDR provided adequate valet parking. DDR promised Gladstone's and other prospective tenants that there would be four valet stations, or multiple valet stations, in the circle and one could be directly in front of Gladstone's. DDR also promised that two other valet stations would be in the nearby surface lot.

DDR and Gladstone's executed a 20-year lease effective on November 26, 2001. It granted Gladstone's the right to use a space in the middle of the circle next to the pier. The lease gave DDR sole control of the valet parking as part of its exclusive administration of the common areas. Section 18.4 of the lease stated, "Landlord shall provide, or cause to be provided, valet parking for Tenant's customers within reasonable proximity of the Premises. The drop-off area for those customers choosing to utilize valet parking is shown on Exhibit A." Exhibit A, which had been shown to Gladstone's before the lease was executed, was a schematic of the complex. The version of Exhibit A shown to Gladstone's before the lease was signed depicted a valet station in front of Gladstone's. However, the version of Exhibit A that was attached to the lease was blurred, almost illegible. Schematics of the complex that were attached to the leases of other tenants showed multiple valet stations.

During lease negotiations, DDR also told Gladstone's that valet parking would be available while Gladstone's was operating, regardless of the hours. DDR stated there would only be four restaurants south of Shoreline Drive serviced by valet operations within the circle. In contrast to the promises made in the 2001 negotiations, there were seven restaurants south of Shoreline Drive, and for more than a year after Gladstone's opened in 2004, the valet parking was not open during all times Gladstone's was operational.

DDR knew, from the first design of the property, that the City planned a bus stop for the circle and that the City controlled the bus stop. However, DDR never explained to

Gladstone's that there would be a bus stop where Gladstone's expected a valet station. The bus stop was in the circle when the complex opened in 2003. This precluded placing four valet stations in the circle. Subsequently, the bus zone was extended, leaving even less room for valet stations. Because buses constantly dropped off passengers in the red bus zone, Gladstone's customers had difficulty leaving their cars with the valet. Also, there was a fire hydrant in the circle at the entrance to the pier.

Additionally, DDR and Gladstone's knew that properties, such as the Pike, had to meet Coastal Commission specifications.

While the City owned the street, the City delegated to DDR valet parking management. DDR's general manager confirmed that DDR had sole control of the common areas, and that the valet was part of the common area.

Further, the valet services provided were insufficient, understaffed, unorganized, and inadequate for Gladstone's patrons. For example, cars would stack-up to the point that customers could not access the restaurant or drop off cars. Parking attendants left vehicles parked at the red curb and in handicap parking stalls, where vehicles were cited. The valet stations were frequently closed and customers had long waits to drop off and retrieve their cars. At times, the circle became gridlocked. Cars could not move at all.

The parking difficulties caused Gladstone's to lose millions of dollars in lost revenues and reduced the value of the business.

B. *Procedural background*.

Gladstone's filed a complaint against DDR alleging a number of causes of action, including breach of contract, fraud, and negligence. Gladstone's also requested equitable relief through its causes of action for reformation and declaratory relief. With regard to fraud, Gladstone alleged it had been fraudulently induced to enter into the lease.

A jury rendered a special verdict on the legal issues in favor of Gladstone's on breach of contract and fraud, but not on negligence. The jury further found that Gladstone's was not entitled to punitive damages because Gladstone's had failed to meet its clear and convincing evidence burden on this issue. (Civ. Code, § 3294.) The jury awarded Gladstone's $4,005,772 in compensatory damages for breach of contract and a

total of $7,804,219 for fraud damages. Gladstone's had sued AmeriPark, Inc., one of the valet parking companies. Prior to the entry of judgment, Gladstone's settled with AmeriPark, Inc. Gladstone's had previously settled with defendant Ace Parking Management, Inc.[2]

After the jury rendered its verdict, the equitable issues of reformation and declaratory relief were tried to the court. The trial court reformed Article 18.4 in the lease to reflect the original intent of the parties. (Civ. Code, § 3399.) As stated above, this article specifically referred to Exhibit A, a schematic of the complex. The trial court acknowledged that the jury had found fraud, and then concluded that whether by fraud, mutual mistake, or unilateral mistake, known or suspected by DDR, the parties intended to incorporate Exhibit A into the contract. However, Exhibit A had not accurately reflected the parties' intent because "[t]he original intent of the parties, as demonstrated through trial testimony and exhibits, was to have several valet parking stations within the circle, including one adjacent to Gladstone's." The court stated that it "cannot . . . simply replace the version of Exhibit A currently attached to the Lease with one of the other versions [submitted during trial] because – although those other versions may more accurately depict the parties' intentions – [because] they were shown at trial to be unworkable in light of subsequent developments (primarily in the form of state and municipal regulation) restricting the use of the circle." "[I]n order to effectuate the parties' original intent as closely as possible," the court amended Article 18.4 of the contract by deleting the reference to Exhibit A and adding a second sentence. Thus, Article 18.4 was to read: " 'Landlord shall provide, or cause to be provided, valet parking for Tenant's customers within reasonable proximity of the Premises. Valet parking pick-up and drop-off must be within the circle as close to Gladstone's as the

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[2] The lawsuit was also brought against a number of DDR's subsidiaries, defendants and appellants DDR Urban LP and DDR Urban, Inc. For simplicity and unless otherwise noted, we have referred to all defendants as DDR.

present conditions will allow, taking into account the existing bus lane and existing fire hydrants.' "[3]

DDR filed a motion for judgment notwithstanding the verdict and a motion for new trial. The trial court denied both motions.

On August 7, 2009, the trial court entered a judgment on special verdict that included prejudgment interest in the total sum of $7,605,884, in favor of Gladstone's.[4] The court also issued to Gladstone's a cost and attorney fee award of more than $1.5 million.

DDR appeals from the judgment. We affirm.

III.

DISCUSSION

A. *There was substantial evidence to support the fraud finding.*

With regard to fraud, DDR contends Gladstone's failed to prove there was an actionable misrepresentation, reasonable reliance, and scienter. We conclude that DDR's arguments are not persuasive.

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[3] Article 21 of the lease stated that in case Gladstone's obtained a "money judgment [against DDR] resulting from any default by Landlord or other claim against Landlord arising under this Lease . . ." the judgment could only be satisfied out of DDR's current net income. Contrary to Gladstone's position at trial, the trial court upheld this provision and found it was not unconscionable. The court further held there was insufficient proof that this section was illegal, i.e., the court rejected the argument that Article 21 operated to exempt DDR from responsibility for its fraud. (Civ. Code, § 1668.) The court found that Article 21 did not apply to the fraud verdict. The court also held that Gladstone's could not offset its rent obligations payments against the verdict based upon Gladstone's fraud in the inducement theory.

[4] The jury awarded Gladstone's $7.8 million in damages. Pursuant to the agreement of the parties, the proper legal rate of prejudgment interest was seven percent, and not ten percent as testified to by Gladstone's expert. The trial court reduced the prejudgment interest award and corrected this amount in the final judgment.

The jury's verdict against DDR's subsidiaries was less than the verdict against the parent company.

1. *Burden of review.*

When the challenge is to the sufficiency of the evidence to support the judgment, our role is well established: " ' "When a finding of fact is attacked on the ground that there is not any substantial evidence to sustain it, the power of an appellate court *begins* and *ends* with the determination as to whether there is any *substantial* evidence contradicted or uncontradicted which will support the finding of fact." ' [Citations.] ' "[W]e have no power to judge of the effect or value of the evidence, to weigh the evidence, to consider the credibility of the witnesses, or to resolve conflicts in the evidence or in the reasonable inferences that may be drawn therefrom." ' [Citations.] Our role is limited to determining whether the evidence before the trier of fact supports its findings. [Citation.]" (*Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 766, first italics in original, second italics added; accord, *Escamilla v. Department of Corrections & Rehabilitation* (2006) 141 Cal.App.4th 498, 514-515.)

" 'If such substantial evidence be found, it is of no consequence that the trial court believing other evidence, or drawing other reasonable inferences, might have reached a contrary conclusion.' [Citation.]" (*Donovan v. Poway Unified School Dist.* (2008) 167 Cal.App.4th 567, 612.)

2. *The elements of fraud.*

Fraud requires: " ' "(a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or 'scienter'); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage." ' [Citation.]" (*Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 974; see also, Civ. Code, §§ 1572, 1709, 1710.) Thus, the material elements of a cause of action for fraud include the intent to deceive and scienter, which are not elements of negligent misrepresentation. (*Anderson v. Deloitte & Touche* (1997) 56 Cal.App.4th 1468, 1476.) Instead, if a defendant makes a false statement, honestly believing it to be true, but without reasonable ground for such belief, the defendant may be liable for negligent misrepresentation. (*Ibid; Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370, 407-408; *City*

of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc. (1998) 68 Cal.App.4th 445, 482; see also Civ. Code, § 1710, subd. 2.)

3. *There was substantial evidence that DDR made material misrepresentations of fact.*

The first element a plaintiff must prove to establish fraud is a false statement. (*Engalla v. Permanente Medical Group, Inc., supra,* 15 Cal.4th at p. 974.) "A misrepresentation need not be oral; it may be implied by conduct. [Citations.]" (*Thrifty-Tel, Inc. v. Bezenek* (1996) 46 Cal.App.4th 1559, 1567.)

DDR acknowledges Gladstone's presented three categories of statements that Gladstone's argued constituted misrepresentations: (1) DDR misrepresented there would be adequate valet parking despite DDR's secret knowledge that the City controlled the location of a bus stop in the circle; (2) DDR erroneously represented that there would be four valet parking stations in the circle, including one directly in front of Gladstone's; and (3) DDR misrepresented that valet parking would be available during all hours Gladstone's would be open and there would be only four restaurants south of Shoreline Drive. DDR acknowledges that these statements were made. However, it states that "assuming . . . the statements were made, there is not substantial evidence establishing each element of intentional misrepresentation."

DDR first argues its statements were opinions about future actions, and thus, were not actionable misrepresentations. To prove fraud, a plaintiff must prove that a false representation was about a past or existing fact. (*Borba v. Thomas* (1977) 70 Cal.App.3d 144, 152 (*Borba*); 5 Witkin, Summary of Cal. Law (10th ed. 2005) Torts, § 774, p. 1124.) A statement of what a defendant "*intends to do* relates to an existing state of mind, and is a representation of fact." (5 Witkin, Summary of Cal. Law, *supra,* Torts, § 781, p. 1131.) However, " 'predictions as to future events, or statements as to future action by some third party, are deemed opinions, and not actionable fraud. . . .' [Citation.]" (*Cohen v. S & S Construction Co.* (1983) 151 Cal.App.3d 941, 946; CACI No. 1904.) "Whether a statement is nonactionable opinion or actionable misrepresentation of fact is a question of

fact for the jury. [Citations.]" (*Furla v. Jon Douglas Co.* (1998) 65 Cal.App.4th 1069, 1081.)

DDR told Gladstone's where the valet stations would be located, the hours of operation, the number of valet stations, and how many restaurants would be serviced by the valets. DDR represented that it controlled the parking. These statements related to DDR's existing state of mind as they were about what DDR intended to do and promises made by DDR about its obligations under the leasing agreement. In the same way that Gladstone's promised to lease a building in the circle, DDR promised to provide adequate valet services and four stations. Thus, DDR's statements were representations of fact and actionable.

DDR tries to deflect its responsibility by suggesting its statements were opinions about the future actions of a third party, the City, who controlled the situation. DDR suggests that in 2003 and 2004, the City took a unilateral and sudden action to substantially extend the red bus zone so it was not possible to have four valet stations in the circle. However, even if the City and the Coastal Commission had to approve site plans for the placement of valet stations as DDR suggests, DDR never prefaced its promises to Gladstone's by saying they were contingent upon governmental approval.[5] Also, neither the City nor the Coastal Commission controlled the situation. Multiple agreements between the City and DDR placed full operational responsibility for parking and valet operations with DDR. While the City and the Coastal Commission might have had to approve changes to the parking operating agreement, DDR managed the parking. Additionally, even after DDR knew the City would be expanding the bus zone, DDR

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[5] There are exceptions to the general rule that a representation about a future event is not actionable. (*Cohen v. S & S Construction Co., supra,* 151 Cal.App.3d at p. 946.) Gladstone's discusses two of these exceptions. The first is "where a party holds himself out to be specially qualified and the other party is so situated that he may reasonably rely upon the former's superior knowledge . . . ." (*Borba v. Thomas, supra,* 70 Cal.App.3d at p. 152.) The second exception is "where a party states his opinion as an existing fact or as implying facts which justify a belief in the truth of the opinion. [Citation.]" (*Ibid.*) We need not discuss these exceptions, both of which would apply here.

continued to depict four valet stations on its diagrams of the complex, thereby repeating its promises to Gladstone's that there would be four valet stations.

Further, DDR focuses only on the bus zone and how that might have affected the number and location of the valet stations. DDR does not address the other misrepresentations, including statements regarding the hours that the valet would operate and the number of restaurants that would rely on valet parking. The problem was not the City's intervention by extending the bus zone, but poor management by DDR. The facts showed that Gladstone's parking needs were met when the valet was properly staffed and when it was open during all hours of Gladstone's operation, regardless of the existence of the bus zone. Thus, the City's actions cannot eliminate DDR's liability for making intentional misrepresentations.

4. *There was substantial evidence to support the finding that Gladstone's reasonably relied upon the misrepresentations.*

Contrary to DDR's contention, there was substantial evidence supporting the conclusion that Gladstone's reasonably relied upon DDR's false statements.

" 'Besides actual reliance, [to prove fraud, a] plaintiff must also show "justifiable" reliance, i.e., circumstances were such to make it *reasonable* for [the] plaintiff to accept [the] defendant's statements without an independent inquiry or investigation.' [Citation.] The reasonableness of the plaintiff's reliance is judged by reference to the plaintiff's knowledge and experience. [Citation.] ' "Except in the rare case where the undisputed facts leave no room for a reasonable difference of opinion, the question of whether a plaintiff's reliance is reasonable is a question of fact." [Citations.]' [Citations.]" (*OCM Principal Opportunities Fund, L.P. v. CIBC World Markets Corp.* (2007) 157 Cal.App.4th 835, 864-865; accord, *Guido v. Koopman* (1991) 1 Cal.App.4th 837, 843.)

DDR presents two arguments: "First, [Gladstone's] leasing attorney admitted that DDR's leasing attorney informed him *during lease negotiations*: 'Overall, the parking is controlled by the City of Long Beach . . . .' [Record citations.] Therefore, it is uncontroverted that [Gladstone's] knew DDR could not with certainty promise future locations of valet in the Circle because the Circle was a City-controlled street. This

knowledge negates any possible reliance. [Citation].) [¶] Second, 'absent some special relationship between the parties, a private person is not entitled to rely on the opinion of another private person concerning the future decisions of a public body.' [Citation.]"

DDR's first reasonable reliance argument is not persuasive. The facts cited by DDR in presenting this argument do not support its position. DDR points to an August 15, 2001, letter sent during the lease negotiations. The letter was from DDR's leasing attorney, Barry L. Bell, to Gladstone's leasing attorney, Robert J. Stemler. Contrary to DDR's argument, a reasonable interpretation of the letter is that Bell did not inform Stemler that the City controlled the parking in the circle. Rather, Bell stated DDR was unable to grant Gladstone's any rights regarding the *surface parking lot*. Stemler did not, as DDR urges, understand this letter to mean that the City controlled the parking in the circle. Stemler testified he interpreted the communication to mean that DDR "would not allow us to control the valet parking, that it had to remain in DDR's control."[6]

Second, DDR argues Gladstone's could not reasonably rely on the statements regarding parking because they were opinion statements as to what the City, a governmental entity, would do in the future. For this proposition, DDR cites *Borba, supra,* 70 Cal.App.3d 144. *Borba* involves a situation in which a buyer finalized a purchase of real property without first obtaining approval of the sale price from the Bureau of Reclamation. Such approval was required in order for the purchaser to obtain

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[6] The relevant portion of this letter is as follows:

"Dear Bob [Stemler]:

"This is in response to your August 8 comment letter. For simplicity, I have repeated your comments, with my responses immediately following in an italicized font:

"1 General Business Comments:

"A Parking. This is a very significant issue to Gladstone's. Gladstone's would like to explore in further detail the·various alternatives for parking including but not limited to **exclusive adjacent surface parking** on Phase 2 of the development.

"Keith Browning will discuss this with the Tenant, but we are unable to grant any rights with ***respect to surface parking*** *on Phase 2. Overall, the parking is controlled by the City of Long Beach and the Landlord* has *rights to use the* same *pursuant to a series of Operating Agreements*." (Bold added.)

Bureau water. (*Id.* at p. 147.) Years after the transaction was completed, the buyer sued the seller based upon the seller's representations that the seller would be able to obtain Bureau approval after the sale was finalized. The appellate court first held that "under the circumstances [the statement that there would be 'no problem' getting Bureau approval did] not qualify as a misrepresentation of fact, but is merely a nonactionable expression of opinion by [the seller]." (*Id*. at p. 152.) The court then held that the buyer did not justifiably rely upon the seller's statement about Bureau approval as it was a "representation of future conduct of public officials. . . . [W]here there is no relation of special trust or confidence between the buyer and seller, and where the means of knowledge of the pertinent facts are equally available to both parties, neither person can justifiably rely on the expressions of opinion by the other concerning future events. [Citation.]" (*Id*. at p. 155.) The *Borba* court also stated that "[a]bsent some special relationship between the parties, a private person is not entitled to rely on the opinion of another private person concerning the future decisions of a public body." (*Id*. at p. 154.)

Borba, *supra*, 70 Cal.App.3d 144 does not assist DDR because, as stated above, the misrepresentations made by DDR were not expressions of opinion about a future event, but statements of fact. DDR did not say that the City would or would not approve any plans for valet services. Rather, DDR made false representations as to the services *it* promised to provide and DDR failed to inform Gladstone's that the City controlled the bus zone.

Given the extensive testimony that Gladstone's representatives had received a number of assurances about the valet parking, and that these assurances were critical to Gladstone's decision to enter into the lease, there was substantial evidence to support the finding that Gladstone's reasonably relied upon DDR's intentional misrepresentations.

5. *There was substantial evidence to establish scienter.*

DDR contends Gladstone's failed to prove scienter because Gladstone's failed "to show that DDR did not actually believe in the truth of [the] alleged statements when it made them." Contrary to DDR's contention, there was substantial evidence proving scienter.

The plaintiff must prove the defendant's knowledge of falsity to establish scienter in a fraud case. (*Engalla v. Permanente Medical Group, Inc., supra,* 15 Cal.4th at p. 974; *Anderson v. Deloitte & Touche, supra,* 56 Cal.App.4th at p. 1476.) "Actual knowledge is not always required." (5 Witkin, Summary of Cal. Law, *supra,* Torts, § 801, p. 1158.) " ' [F]alse representations made recklessly and without regard for their truth in order to induce action by another are the equivalent of misrepresentations knowingly and intentionally uttered.' " (*Engalla, supra,* at p. 974, quoting *Yellow Creek Logging Corp. v. Dare* (1963) 216 Cal.App.2d 50, 55.)[7] If, however, the defendant makes "a false statement, honestly made in the belief it is true, but without reasonable ground for such belief[,]" the defendant has made a negligent misrepresentation. (*Anderson v. Deloitte & Touche, supra,* at p. 1476.)

While mere nonperformance is insufficient to establish a lack of intent to perform, "[f]raudulent intent must often be established by circumstantial evidence[, and may be] inferred from such circumstances as defendant's . . . failure even to attempt performance, or his [or her] assurances after it was clear he [or she] would not perform. [Citation.]" (*Tenzer v. Superscope, Inc.* (1985) 39 Cal.3d 18, 30; accord, *Locke v. Warner Bros., Inc.* (1997) 57 Cal.App.4th 354, 368.)

Here, the testimony showed that DDR's leasing agents, Keith Browning and Margaret Georgilas, repeatedly made statements about the number of restaurants that would share valet services, and the number and location of the valet stations. For

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[7] See also, Civil Code section 1572, subsection 1 [the "suggestion, as a fact, of that which is not true, by one who does not believe it to be true" constitutes actual fraud]; accord, Civil Code section 1710, subsection 1 [same with regard to deceit].

example, John Sangmeister (Gladstone's primary owner) testified Browning said that one valet would be in front of Gladstone's. Gladstone's in Malibu was the most successful restaurant in Los Angeles County. Alan Redhead, one of Gladstone's principals, had operated the Gladstone's in Malibu for years. He testified that Browning promised that a "[valet] station would be right in front of Gladstone's[]" where Gladstone's wanted it. Browning agreed with Sangmeister that the language "within reasonable proximity" in Article 18.4 of the lease meant that a valet station would be in the circle, effectively at the end of the pier, right near Gladstone's. According to Stemler, before the lease was signed, DDR's representatives rolled out large maps on a table depicting four valet drop off stations, one of which was immediately in front of Gladstone's. Leases DDR signed with other tenants included site maps of the complex which also depicted four valet stops in the circle. Only after Gladstone's filed its lawsuit in 2005, did DDR remove the site plan from its website.

Yet, in contrast to these statements, Georgilas admitted she knew the City controlled the bus stop, and she was unaware of anyone informing Gladstone's that there was going to be a bus stop where Gladstone's wanted a valet station. Thus, despite DDR's knowledge that the bus stop might preclude a number of valet stations in the circle, DDR repeatedly gave assurances to Gladstone's about the number and placement of the valet stations.

According to Sangmeister, Keith Browning told Gladstone's that "there would only be four restaurants south of Shoreline Drive that would encircle the Pine Avenue Circle, only four." Yet, there were seven restaurants.[8]

The lease required Gladstone's be open seven hours per week. The lease also stated that the common areas, which DDR controlled, were to be open 13 hours every day. DDR promised the valet would be open during all hours that Gladstone's would be

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[8] These are the restaurants that were located south of Shoreline Drive, and the dates they opened: (1) P.F. Chang -- October 2003; (2) Outback Steakhouse -- March 2004; (3) Gladstone's -- November 2004; (4) Chili's -- March 2005; (5) Tokyo Wako -- November 2005; (6) Boston's Gourmet Pizza -- July 2006; and (7) Famous Dave's -- October 2007.

open. For example, Browning told Sangmeister that parking would be available when Gladstone's was open, regardless of the hours. Yet, for the first year Gladstone's operated, there was no valet at lunch, but only at dinner time. It took 14 months before DDR arranged for valet during lunch. In response to the lawsuit, DDR provided valet services at lunch and dinner, but still did not provide services for all hours Gladstone's was open. Further, photographs, videotape, and testimony revealed that the valet was totally understaffed, not open when promised, and customers had long waits for service. Over the years, DDR did not address Gladstone's repeated complaints about the inadequacy of parking staffing.

From the evidence delineated above, the jury reasonably found that DDR made false representations of matters within its knowledge which it had no reasonable grounds for believing to be true in order to induce Gladstone's to enter into the lease. The number of false promises and insufficient services provided substantial evidence of scienter. At the least, the representations were made recklessly and without regard for their truth in order to induce action by Gladstone's.

DDR suggests scienter cannot be shown based upon its statements regarding the placement of the valet stations because the City placed the red bus zone curb in the circle in 2003, two years *after* the 2001 lease negotiations. DDR also notes that this bus zone was extended in 2003 and 2004, and the City issued permits to allow some people involved in the Marine Bureau to park in the circle. Thus, DDR argues placing multiple parking stands in the circle was rendered impossible by the City's actions. To support this argument, DDR relies upon the applications filed with the City and the Coastal Commission. DDR notes that the plans depicting the bus stop are not shown on the plans until 2002, when the sixth amendment to DDR's project plan was filed with the Coastal Commission. DDR also points to other evidence in the record that seems to suggest that the bus zone was not in the circle during the time the lease was negotiated, but only when the project opened to the public. However, as discussed above, Georgilas admitted DDR knew while it was discussing the lease with Gladstone's in 2001, that the City planned a bus stop in the circle and the City would have to approve its relocation. Yet, no one ever

provided this information to Gladstone's. Thus, even if the bus red zone was not placed in the circle until after the lease was executed, DDR knew there would be a bus zone at the time DDR was negotiating with Gladstone's and never communicated this information to Gladstone's. Rather, DDR repeatedly made promises it knew it could not keep with regard to the placement of the valet stations.

DDR points to an email written by its western region director of development to prove there was "uncontroverted evidence of DDR's belief in 2001 that the City would not impede the approved valet locations." In this 2004 email, the director (Stan Hoffman) stated in part, "[t]he entire [circle] area . . . is restricted use for the bus lines and Marine division, precluding a station in front of Gladstone's. When this Gladstone's station was originally contemplated, the bus lines had not yet imposed restrictions for a bus stop." However, DDR has not explained the involvement of director Hoffman in the 2001 lease negotiations, how his state of mind in 2004 reflected DDR's state of mind in 2001, or why this one piece of evidence totally destroys the reasonable inferences that can be drawn from other evidence introduced at trial.

Lastly, DDR contends the red bus zone is a governmental restriction making it impossible for DDR to operate multiple valet stops in the circle, and thus, adequate valet services. However, Luis Maldonado, Long Beach City Parking Operations Administrator, testified it was permissible for the valet to use the curb lane and even create a second lane of cars, as long as the vehicles were moved quickly and not stacked. Further, as discussed above, when the valet was properly staffed, Gladstone's parking needs were met. Thus, the placement of the bus zone did not prevent DDR from providing adequate valet services, had the valet stations been properly staffed.

There was substantial evidence proving DDR made actionable misrepresentations.

B. *Gladstone's proved causation*.

DDR asserts Gladstone's did not establish causation. We are not persuaded by this assertion.

"In order to recover for fraud, as in any other tort, the plaintiff must plead and prove the 'detriment proximately caused' by the defendant's tortious conduct. [Citation.]

Deception without resulting loss is not actionable fraud. [Citation.]" (*Service By Medallion, Inc. v. Clorox Co.* (1996) 44 Cal.App.4th 1807, 1818; Civ. Code, §§ 1709, 3333.) "Causation requires proof that the defendant's conduct was a ' "substantial factor" ' in bringing about the harm to the plaintiff. [Citations.]" (*Williams v. Wraxall* (1995) 33 Cal.App.4th 120, 132.) " 'A mere possibility of such causation is not enough[.]' " (*Ortega v. Kmart Corp.* (2001) 26 Cal.4th 1200, 1205; *Whiteley v. Philip Morris, Inc.* (2004) 117 Cal.App.4th 635, 699.) Causation may be proven by expert testimony as long as the expert's conclusions are not based on conclusions or assumptions not supported by substantial evidence. (Cf. *Hongsathavij v. Queen of Angeles etc. Medical Center* (1998) 62 Cal.App.4th 1123, 1137.)

Likewise, a breach of contract cause of action requires proof that the breach caused damages. (Civ. Code, § 3300.)

Randall William Hiatt was a restaurant consultant, with many years of experience in the restaurant industry. He testified as an expert for Gladstone's. Hiatt testified that parking is critical to a restaurant's success and a restaurant's sales and profits are diminished if parking is inadequate. Hiatt also testified to the following. Restaurants lose customers who turn away because parking is inadequate, and those who do dine at a restaurant will not return if they are inconvenienced by inadequate parking. Other tenants in the circle described the parking as "horrendous." When Gladstone's opened in 2004, the economy was robust, and thus, Gladstone's should have done well. In a 2006 customer survey, 41 percent of those responding had negative comments about Gladstone's parking and in a 2008 survey, 48 percent had negative comments.[9] Because the high degree of dissatisfaction with parking so overshadowed other complaints, this problem was the sole cause of Gladstone's lost profits.

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[9] For example, with regard to the 2006 survey, 28 percent responded that they had had a "[n]egative experience/crowded/too far to walk/negative comments; 7 percent stated "[p]arking full – turned away," and 6 percent stated the parking was "too expensive."

DDR argues the evidence from Hiatt cannot constitute substantial evidence as it lacked the proper foundation and provided Gladstone's sole evidence on causation. DDR is wrong on both points.

DDR is correct when it states that since Gladstone's opened its doors in 2004 it has served about 700,000 customers and that the two surveys account for a small percentage of them, about 1,000 customers. Also, as Hiatt admitted, he only went to Gladstone's about six times in 2006 and 2008, and in reaching his conclusions he did not examine the entire manager's log, the Ever Clean Company report, secret shopper reports, customer complaints, health inspection reports, investors' concerns, or the effect of marketing efforts. These facts were used by DDR to attack Hiatt's credibility. However, they do not demonstrate Hiatt's testimony lacked foundation.

Hiatt explained that approximately 400 guests in 2006 and 550 in 2008 responded to the questionnaires. He also testified to the following to demonstrate that the results from the surveys were statistically significant. The 2006 survey had a variance rate of 4.9 percent, and the 2008 had a variance rate of 4.2 percent. This meant that if a survey response was 90 percent, based upon a 4.2 percent variance rate, the real answer is somewhere between 85.8 and 94.2 percent, demonstrating their reliability. (Cf. *People ex rel. Lockyer v. R. J. Reynolds Tobacco Co.* (2004) 116 Cal.App.4th 1253, 1276 ["Statistical validity is a measure of whether the test is suitable for its intended purpose, which evaluates whether test results are consistent with reality."].)

Second, it does not matter if Hiatt was the only witness presenting causation evidence. Testimony of one witness can constitute substantial evidence. (*In re Marriage of Mix* (1975) 14 Cal.3d 604, 614; *Jensen v. BMW of North America, Inc.* (1995) 35 Cal.App.4th 112, 134.) Further, there were others who testified that parking concerns reduced Gladstone's revenues. Gary Coburn, Gladstone's president and chief operating officer, had been in the restaurant business for 30 years. He testified that the restaurant lost 100,000 to 200,000 customers as a result of parking. Sangmeister testified that parking problems had an enormous impact on the restaurant's revenues. Gladstone's provided additional expert testimony from James Skorheim on this issue. He testified

that he had examined, along with Hiatt, "a number of different potential reasons" for the loss in expected revenues. After a process of elimination, he and Hiatt "were left with the only real problem . . . facing [Gladstone's was] the parking, and, therefore, the reduction in revenues was likely to have been caused by that parking." Skorheim additionally testified that the inadequate parking services cost Gladstone's loss revenues, depressed Gladstone's value, and resulted in a loss of interest.

Gladstone's also presented correspondence from other tenants, as well as documentation of customer complaints indicating that parking was an issue, discouraged customers from eating at Gladstone's, and caused customers to cancel reservations. At a cost to Gladstone's, Gladstone's sent gift cards to customers who complained about the valet services.

This evidence, taken together with the photographs demonstrating parking congestion and crowds of customers waiting for the valet, supported the conclusion that the parking situation caused Gladstone's to lose revenues.

There was substantial evidence of causation.

C. *Gladstone's proved damages.*

DDR contends that there was no substantial evidence to prove the damage award. This contention is not persuasive.

1. *Gladstone's established with reasonable certainty the damages award for lost profits.*

We are not persuaded by DDR's contention that Gladstone's failed to prove lost profits with certainty.

Tenants of businesses, even tenants who establish a new business, may recover lost profits upon the landlord's breach of contract if the evidence offered establishes that the damages were reasonably certain. (*Kids' Universe v. In2Labs* (2002) 95 Cal.App.4th 870, 883; *Parlour Enterprises, Inc. v. Kirin Group, Inc*. (2007) 152 Cal.App.4th 281, 288 (*Parlour*).) "Certainty as to the amount is not required; reasonable certainty is sufficient. [Citation.]" (*Parlour, supra,* at p. 288; compare *S. Jon Kreedman & Co. v. Meyers Bros.*

Parking-Western Corp. (1976) 58 Cal.App.3d 173, 184-185 [parking garage], *Hoag v. Jenan* (1948) 86 Cal.App.2d 556, 563-564, and *Parlour, supra.*)

" ' "[I]f the business is a new one or if it is a speculative one . . . , damages may be established with reasonable certainty with the aid of expert testimony, economic and financial data, market surveys and analyses, business records of similar enterprises, and the like." ' [Citation.] '[T]he experience of similar businesses is one way to prove prospective profits. [Citations.] Also relevant is whether the market is an established one. [Citations.]' [Citations.] ' "A plaintiff's [or a third party's] prior experience in the same [or similar] business has been held to be probative [citations]; as has a plaintiff's [or a third party's] experience in the same [or similar] enterprise subsequent to the interference. [Citations.]" ' [Citation.] ' "Similarly, prelitigation projections, particularly when prepared by the defendant, have also been approved. [Citation.] The underlying requirement for each of these types of evidence is a substantial similarity between the facts forming the basis of the profit projections and the business opportunity that was destroyed." [Citation.]' [Citation.] ' " '[E]xpert testimony alone is a sufficient basis for an award of lost profits in the new business context when the expert opinion is supported by tangible evidence with a "substantial and sufficient factual basis" rather than by mere "speculation and hypothetical situations." ' [Citations.]" ' [Citation.]" (*Parlour, supra,* 152 Cal.App.4th at p. 288.)

By the time of the September 2008 trial, Gladstone's had been operational for four years beginning in November 2004. Thus, it was not a start-up business lacking a financial history and it was not one of the 60 to 70 percent of all new restaurants that fail within two years of opening.

Hiatt provided some of the testimony to support Gladstone's claim for damages. The bulk of the testimony on this point, however, came from Skorherim, an accountant and lawyer. He calculated lost profits from January 2006 through May 2008 for a total of $4,712,672. He also calculated the lost goodwill value to be $3,651,737 and lost prejudgment interest of $817,023.

To reach his lost profits calculation, Skorheim examined numerous sources of data, including the pleadings, discovery, the lease between Gladstone's and DDR, Gladstone's monthly financial reports, daily sales reports, at least four or five comprehensive commercial data bases regarding business intelligence and statistics on restaurants, Gladstone's forecasts and private placement memorandums, and the National Restaurant Association restaurant forecast. These resources provided Skorheim with data about restaurant businesses such as "information about various ratios of these businesses, what their working capital is, what their return on investment is, what their assets are as a percentage of sales, . . . what their assets and liabilities are in relationship to equity, [and] various financial metrics . . . ." Skorheim also consulted with Hiatt. Skorheim interviewed Gladstone's representatives, Sangmeister, Coburn, and Redhead, and read their depositions.

Skorheim testified as to his analysis methodology regarding lost profits and, in particular, how he used comparable restaurants.

Skorheim explained that it is difficult to obtain financial information on independently owned restaurants, such as Gladstone's, because the owners of these businesses are not required to disclose this data. Skorheim started by looking at more than 1,000 restaurants where he could obtain some financial metrics and data on the number of seats in the restaurants. He looked at those with similar seating capacity and confined the search to restaurants that had check averages for casual dining operations, similar to Gladstone's, and eliminated fast food and gourmet establishments.

Hiatt had identified a list from the Restaurants and Institutions magazine of the top 100 restaurants around the country for which there was available financial information for the year 2006. Hiatt looked at the Zagat ratings that evaluated food service, food quality, etc., and concluded those on the list were moderately performing restaurants. From this list, Hiatt narrowed the focus to about nine restaurants that were similar to Gladstone's because they were independent, waterfront restaurants, with a seafood

format. This included Gladstone's in Malibu.[10] Hiatt then added the Yard House restaurant to the list. Although it was not a seafood restaurant, it had a complete seafood menu and was located in close proximity to Gladstone's in Long Beach. Skorheim thought Hiatt had omitted from the list three restaurants that met the criteria: Bob Chinn's Crab House, Salty's on Alki Beach, and Atlanta Fish Market. Skorheim examined the average seat comparison for these restaurants, i.e., the amount of money earned per seat, and ranked them from the highest sales per seat to the lowest. Skorheim also examined the average seat for California restaurants. He then determined Gladstone's should rank in the 25th percentile, or about $24,000 per seat per year, which is between low and the California average. This would result in annual revenues for Gladstone's of about $10 million per year. This number was reduced by the National Restaurant Association industry forecast. Skorheim included a 25 percent discount factor for the entire period of 2005 to account for a ramp-up period.

At each step of the process, Skorheim took a conservative approach. He did not consider the losses Gladstone's suffered for the first two months of its operation, in November and December 2005. He calculated damages through May 2008, and did not consider those months immediately preceding the September 2008 trial. By adding the Yard House to the list of comparable restaurants, the loss projection was decreased because the per seat sales for the Yard House was lower than the California average. After adding Bob Chinn's Fish House and Atlanta Fish Market to the list, he discovered they were not on the water. Skorheim left them on the list, however, because these two restaurants had some of the same characteristics he was looking at, and also because both had average revenues that were below the average, thereby reducing his calculation of Gladstone's expected loss.

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[10] The Malibu restaurant had 720 seats and the Long Beach restaurant had 405 seats and both provided a waterfront seafood experience. Both Hiatt and Skorheim opined it was appropriate to compare the two.

Further, there was evidence that members of Gladstone's team, including Redhead who had run Gladstone's in Malibu, and Coburn, who had 30 years of experience in the restaurant business, had extensive management experience with a track record of success. Their relationship to Gladstone's would have increased the likelihood of success, and increased the certainty that the parking situation contributed to Gladstone's losses. Skorheim testified that absent parking problems, Gladstone's would have had a very high level of revenues.

DDR argues Skorheim's opinion on Gladstone's lost profits was not established with reasonable certainty because it was based on a list of restaurants that were not comparable. DDR analogizes the present situation to *Parlour, supra*, 152 Cal.App.4th 281 wherein the appellate court concluded that the expert's selection of comparable restaurants was not comparable. (*Id.* at pp. 290-291.) *Parlour* is not akin to the present case.

In *Parlour,* a jury had awarded approximately $6.6 million to the plaintiffs for lost profits, lost franchise fees, and other expenses incurred when the defendants terminated a franchise agreement to develop subfranchises for ice cream parlors that also sold food in a restaurant called Farrell's. (*Parlour, supra,* 152 Cal.App.4th at pp. 283-284, 287.) To calculate damages, plaintiffs' expert had relied upon projections the plaintiffs had prepared to give to investors, and "not based on actual operations, but rather consisted of [the plaintiffs'] assumptions for the next five years. Each contained disclaimers that the income and expense estimates might not reflect actual results. The record [did] not reveal the method used to calculate the projections." (*Id.* at p. 289.) Two of plaintiffs' representatives did not testify as to "any particular qualifications that would allow them to predict income, expenses, or profits for [the restaurants], as opposed to any other restaurant. Nor did anyone testify as to the facts underlying the projections or the calculations used to prepare them. There was no testimony they based their predictions on the operation of the single Farrell's that [the plaintiffs were] able to open . . . or any other actual numbers that would be reliable indicators of future income, expenses, or profits of a Farrell's in another city." (*Id.* at pp. 289-290.) *Parlour* held that the

projections were not sufficiently reliable to support a claim for lost revenues as they had been prepared by the plaintiff and there was no evidence as to how the projections were calculated. (*Id.* at p. 290.)

In *Parlour, supra,* 152 Cal.App.4th 281, the expert compared the new business with a publicly traded restaurant chain called Friendly's. Because the expert's description of Friendly's business model was cursory and "failed to establish its profit-and-loss experience," the appellate court held it was not "sufficiently similar to Farrell's to be relevant to the question of [the] plaintiffs' alleged lost profits. [Citation.]" (*Id.* at p. 290.) Also, the dozen or so ice cream parlors the expert had discussed as a basis for his analysis were not shown to be sufficiently similar in concept to Farrell's to provide valuable data. (*Ibid.*) Lastly, the appellate court held that other items relied upon by the expert did not support the expert's lost profits analysis because the expert had not used actual data, or there was no evidence as to how the evidence affected his calculations. (*Id.* at p. 291.)

In comparison to *Parlour, supra,* Gladstone's was operational. Gladstone's expert Skorheim did not rely solely on projections prepared by Gladstone's. Skorheim relied upon a number of sources, including financial and sales reports, commercial data bases, Gladstone's forecasts and private placement memorandums, and the National Restaurant Association restaurant forecast. The comparable restaurants utilized by Skorheim were similar in concept to Gladstone's as they were seafood, waterfront, dining establishments that were not gourmet and not fast food. (If two of the restaurants were not comparable in concept, Skorheim kept them on the list because they actually reduced Skorheim's projected loss conclusion.) Those on the list had comparable per seat check averages. Skorheim explained the selection process, as well as where he had obtained his data, and how the information affected his analysis. Those involved with Gladstone's had management experience contributing to the certainty of the damages claimed by Gladstone's.

Thus, the evidence was sufficient to provide a foundation for Skorheim's lost profits opinion and to prove the jury's award.

2. *The award for lost business value, or lost goodwill was not speculative or excessive.*

DDR contends that the award for lost business value (goodwill) was unsupportable because it was based upon speculation and was excessive. This contention is not persuasive.

Skorkheim explained the concept of lost business goodwill. After a long analysis, including an examination of a number of factors, he opined that the actual lost goodwill was $3,651,737.

DDR first argues Skorheim's analysis of lost goodwill was speculative because it was based on his speculative expected profits analysis. However, as discussed above, Skorheim's expected profits analysis was not speculative.

DDR then argues that the goodwill analysis was unsupported to the extent it included an analysis of future lost profits that presupposed Gladstone's would continue to have parking difficulties. DDR cites to evidence that since AmeriPark, Inc. was hired in 2006, the valet services improved. However, other evidence indicated that improvements were inconsistent and that in August 2008, there were still long delays in retrieving cars. Thus, DDR's argument lacks factual foundation.

We are not persuaded by DDR's suggestion that the award for lost business value, or goodwill was speculative and excessive.[11]

D. *DDR was not entitled to a new trial.*

As a general rule, a trial court has wide discretion in ruling on a motion for a new trial, and the court's decision will be given great deference on appeal. (*Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal.4th 826, 859; *City of Los Angeles v. Decker* (1977) 18 Cal.3d. 860, 871-872.) However, when we review an "order *denying* a new trial, as distinguished from an order *granting* a new trial, we must fulfill our obligation of

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[11] We do not address damage arguments DDR raised for the first time in its reply brief.

Given that there is substantial evidence to support the verdict, the trial court correctly denied DDR's motion for judgment notwithstanding the verdict.

reviewing the entire record, including the evidence, so as to make an independent determination as to whether the error was prejudicial. [Citations.]" (*City of Los Angeles, supra*, at p. 872; *ABF Capital Corp. v. Berglass* (2005) 130 Cal.App.4th 825, 832.) Where a more specific review standard applies to the particular claim of error, we use that standard in reviewing the order denying the new trial motion. (*Aguilar, supra*, at p. 859.)

"Irregularity in the proceedings" and "error in law" are two of the grounds that may be used by a trial court to assess if a new trial should be granted. (Code Civ. Proc., § 657; *Oakland Raiders v. National Football League* (2007) 41 Cal.4th 624, 633; cf. *McCarty v. Department of Transportation* (2008) 164 Cal.App.4th 955, 983-986.)

1. *The impossibility instructions do not warrant reversal.*

DDR first contends that instructional error with regard to the impossibility instructions warrants reversal. This contention is not persuasive.

"The court's duty to instruct the jury is discharged if its instructions embrace all points of law necessary to a decision. [Citation.] A party is not entitled to have the jury instructed in any particular fashion or phraseology, and may not complain if the court correctly gives the substance of the applicable law. [Citation.]" (*Thompson Pacific Construction, Inc. v. City of Sunnyvale* (2007) 155 Cal.App.4th 525, 553.)

"When a party challenges a particular jury instruction as being incorrect or incomplete, 'we evaluate the instructions given as a whole, not in isolation.' [Citation.] ' "For ambiguous instructions, the test is whether there is a reasonable likelihood that the jury misunderstood and misapplied the instruction." ' [Citation.] The propriety of jury instructions is a question of law that we review de novo. [Citation.]" (*Cristler v. Express Messenger Systems, Inc.* (2009) 171 Cal.App.4th 72, 82.) There must be more than an abstract possibility that the jury was misled. (*Kinsman v. Unocal Corp.* (2005) 37 Cal.4th 659, 682.) We reverse a judgment for instructional error only " ' "where it seems probable" that the error "prejudicially affected the verdict[]" '. . . (*Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 983) and resulted in a miscarriage of justice. (Cal. Const., art. VI, § 13.)

The trial court read two instructions to the jury with regard to impossibility. They were identical, except the last phrase in the second instruction was not included in the first. The first instruction was given over DDR's objection. It stated: "Laws or other governmental acts that make performance unprofitable or more difficult or expensive do not excuse the duty to perform a contractual obligation." The second instruction was given immediately after the first. It read: "Laws or other governmental acts that make performance unprofitable or more difficult or expensive do not excuse the duty to perform a contractual obligation *unless the difficulty is extreme and the cost extraordinary*." (Italics added.) These instructions related to DDR's argument that the City's sudden and unilateral actions made the operation of a valet in front of Gladstone's restaurant impossible. DDR submitted the second instruction arguing it more accurately enunciated the law.

DDR suggests the jury was misled because it would not understand which of the two instructions correctly articulated the law. However, the jury did not express any concerns about having two instructions on the same point and to assume the jury was misled is simply an abstract possibility. The jury would have understood, reading the instructions as a whole, that the second instruction amplified or elaborated on the first. DDR does not suggest Gladstone's argument to the jury included a misstatement of the law on impossibility. Nor does DDR show that the jury requested additional instruction on this issue. (Cf. *LeMons v. Regents of University of California* (1978) 21 Cal.3d 869, 876 [with regard to instructional error, courts consider degree of conflict in the evidence, whether respondent's argument contributed to the instruction's misleading effect, whether the jury requested rereading of erroneous instruction or related evidence, closeness of verdict, and effect of other instructions in remedying error].) Thus, we cannot conclude the trial court abused its discretion in denying DDR's motion for a new trial motion to the extent DDR argued there was instructional error.

2. *There was no evidentiary error warranting reversal*.

Gladstone's introduced emails it sent to DDR complaining about the parking, as well as photographs depicting the situation. For example, photographs showed cars stacked up, log jams, vehicles left for long periods of time, and large numbers of customers waiting at a valet station. Further, Gladstone's introduced parts of videotape footage taken by surveillance cameras for approximately one month, from June to July 2008. Gladstone's introduced some still photographs that had been culled from the videotape footage, including those showing the valet station was closed and hundreds of guests had been turned away. The trial court denied DDR's in limine motion that had sought to exclude these items.

DDR first argues Gladstone's failed in its obligation to preserve evidence when the litigation was contemplated and ongoing because Gladstone's did not preserve all of the videotaped images. DDR suggests this amounted to spoliation of evidence warranting sanctions.

Sanctions, such as the exclusion of evidence, are not warranted where evidence is innocently destroyed in the ordinary course of business. (*New Albertsons, Inc. v. Superior Court* (2008) 168 Cal.App.4th 1403, 1431.) The ordinary operation of a video security system resulting in an inability to produce video is not egregious misconduct warranting the exclusion of evidence. (E.g., *New Albertsons, Inc.*, *supra*, 168 Cal.App.4th 1403; compare with *Micron Technology, Inc. v. Rambus Inc.* (D. Del.2009) 255 F.R.D. 135 [company policy to purge potential evidence as litigation strategy].) Here, the security system was designed to routinely overwrite old footage, roughly on a monthly basis. After litigation began, Gladstone's hired a consultant to alter the system so it would preserve all images. Later, Gladstone's discovered that the modifications had not worked. Gladstone's was able to preserve a month's worth of footage (June to July 2008) from the system's hard drive. These facts do not involve a situation where a party purposefully destroyed evidence, but one where evidence was destroyed in the ordinary course of business.

Second, DDR argues this evidence should have been excluded because it was misleading to introduce only a portion of the photographs and videotape footage. (Evid. Code, § 352.) We are not persuaded by this contention. DDR does not suggest the photographical materials were inaccurate representations of what was depicted. The jury was informed that all items that could have been obtained from the video recorder were not introduced. DDR has not shown that the images introduced into evidence by Gladstone's were staged. Rather, the evidence was that Sangmeister took photographs when he observed problems with the valet. Thus, the jury was not misled. And, DDR has not presented any authority to support its claim that Gladstone's had the obligation to submit all photographs taken. If DDR believed the photographs depicted events that happened only on rare occasions and did not accurately depict every day events, DDR was free to introduce photographs it had taken. Instead, DDR chose to present only segments of the videotape obtained from Gladstone's video system, even though DDR could have introduced the entire month's worth of footage.[12] DDR did not introduce other photographs it had taken.

Thus, the trial court did not abuse its discretion in denying DDR's motion for a new trial motion to the extent DDR argued there were evidentiary errors.

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[12] DDR also contends the trial court improperly admitted a July 14, 2008 letter and invoice from DDR to Gladstone's in which DDR attempted to enforce Gladstone's lease obligation to pay its share of common costs, including valet operating costs. In that this and other arguments are raised in footnotes, they are waived. (*Evans v. Centerstone Development Co.* (2005) 134 Cal.App.4th 151, 160.)

IV.

DISPOSITION

The judgment is affirmed. Gladstone's is awarded all costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ALDRICH, J.

We concur:

KLEIN, P. J.

KITCHING, J.